NO. 83024-0

SUPREME COURT OF THE STATE OF WASHINGTON

BELLEVUE SCHOOL DISTRICT,

Petitioner,

v.

E.S.,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER
(REVISED)

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A. ISSUE

Does the Due Process Clause of the Fourteenth Amendment of the United States Constitution require appointed counsel for juveniles in truancy proceedings at the point where there is an immediate threat to the juvenile's physical liberty, but not earlier?

B. STATEMENT OF THE CASE

E.S. was enrolled in a high school in the Bellevue School District (District) but she missed numerous school days at the beginning of the 2005 - 2006 academic year. CP 90 - 93. After attempts to persuade her to return to school failed, on March 1, 2006 the Bellevue School District filed a truancy petition pursuant to RCW 28A.225.030. CP 1-12. On March 6, 2006, a hearing was held wherein E.S. appeared with her mother and an interpreter for her mother. RP 3/6/06 at 3. The Bellevue School District Truancy Coordinator, a non-lawyer representative, appeared on behalf of the Bellevue School District. CP 21-22. No prosecutor was present. By the time of the hearing, E.S. had missed 73 out of 100 days of the school year; or about ¾ of the academic year. Id. E.S admitted truancy and the court entered an order assuming jurisdiction over the case. Id.; CP 16-17.

The next hearing was held three weeks later, on March 27, 2006. The hearing was attended by E.S., her court-appointed lawyer, Zachary

Jarvis, her mother, an interpreter, and a school district representative. CP 28, 31. No prosecutor was present. E.S. had still failed to attend school so community service was imposed as a remedial sanction. CP 28-30.

In the full year between March 2006 and March 2007, no fewer than 10 hearings were scheduled in juvenile court.[1] At each of these hearings, E.S. appeared with at least one court-appointed lawyer and her mother. An interpreter was also provided at each hearing. A District representative also attended. A prosecutor never appeared on behalf of the Bellevue School District during this period. Over the course of that year, E.S. did not attend school, despite repeated orders from the court, remedial contempt sanctions, and numerous opportunities to purge the contempt. As remedial sanctions, E.S. was ordered to perform community service, to write papers, to serve time on electronic home monitoring for two 7-day periods, and to perform other tasks. She was never ordered to serve a period of detention nor was she ordered to submit to drug or alcohol testing. See Appendix A and cited Clerk's Papers.

In May 2007, E.S. filed a motion to dismiss the truancy finding claiming that the court had violated her right to counsel by failing to appoint a lawyer at the first hearing, even though she had been provided

[1] A chronology of these hearings including citations to clerk's papers is attached as Appendix A.

with lawyers for all other hearings. The King County Prosecuting Attorney's Office appeared on June 15, 2007, one year and three months after the truancy petition was filed. CP 89. The prosecutor opposed the motion to dismiss. CP 89-180.

On June 26, 2007, a commissioner denied the motion. CP 187. E.S. sought revision of the commissioner's ruling and on July 27, 2007, the Honorable Patricia Clark affirmed the commissioner's ruling, citing In re Truancy of Perkins, 93 Wn. App. 590, 969 P.2d 1101, review denied, 138 Wn.2d 1003 (1999). CP 198-200. E.S. appealed. CP 205-208. For the remainder of 2007 and into 2008, E.S. did not attend school. CP 209-212, 225-30.

The Court of Appeals subsequently held that the Due Process Clause of the U.S. Constitution required appointment of counsel at the first hearing following the filing of a truancy petition. Bellevue School District v. E.S., 148 Wn. App. 205, 199 P.3d 1010 (2009). The court found that E.S.'s liberty, privacy, and educational interests were jeopardized by the truancy action, that the State's interests were insubstantial, and that the risk of error was high, so due process required counsel at any hearing. The court's decision abrogated its earlier decision in In re Perkins. Id. at 212-13. Reconsideration was denied and this Court subsequently granted the District's petition for review.

C. ARGUMENT

The Supreme Court, this Court, and the Washington Court of Appeals have held that counsel is constitutionally required in a civil proceeding where a litigant's liberty interest is at stake. E.S. argues, and the Court of Appeals agreed, that a different rule should apply as to juveniles in truancy proceedings. That argument should be rejected and the Court of Appeals' decision reversed. The rights of juveniles are sufficiently protected by the existing statutory scheme, which comports with due process. Counsel is provided when liberty is at stake. No special rule should be created as to juveniles in truancy cases. No appellate court has held that juveniles are constitutionally entitled to a lawyer *before* liberty is at stake, and the foreign statutes cited by E.S. fail to show that Washington's truancy laws are out of step with accepted norms.

The Court of Appeals adequately explained the statutory framework for Washington compulsory attendance and truancy laws. Bellevue School Dist. v. E.S., 148 Wn. App. at 207-09. That framework says that school districts shall notify children and their parents of compulsory attendance laws, that the districts will monitor attendance, that districts will identify truants, and that the district will intervene and attempt to persuade truants to return to regular school attendance. RCW 28A.225.005 - .020. If the child does not re-enter school, the district must

file a petition with the juvenile division of the superior court. RCW 28A.225.030. The court may hold a preliminary hearing or may refer the matter to a community truancy board if available in the district. RCW 28A.225.035. At the preliminary hearing, the court may order the juvenile to stay in school, change schools, appear before a truancy board, or submit to alcohol and drug testing where necessary to facilitate the child's return to school. RCW 28A.225.090. Counsel is appointed once contempt sanctions are to be considered. E.S. at 209 (citing Tetro v. Tetro, 86 Wn.2d 252, 544 P.2d 17 (1975)). Contempt sanctions may include detention or other remedial measures designed to coerce compliance with the court's orders.

1. STANDARD OF REVIEW.

A statute is presumed constitutional, and the party challenging it bears the burden of proving it is unconstitutional beyond a reasonable doubt. In re Detention of Bergen, 146 Wn. App. 515, 195 P.3d 529 (2008). Allegations of constitutional violations are reviewed de novo. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). A state is "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Schall v. Martin, 467 U.S. 253, 268, 104

S. Ct. 2403, 81 L. Ed. 2d 207 (1984) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934) and Leland v. Oregon, 343 U.S. 790, 798, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952)). "A ... procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." Snyder v. Massachusetts, 291 U.S. at 105.

2. UNDER THE DUE PROCESS CLAUSE, COUNSEL IS PRESUMPTIVELY NOT REQUIRED IN A CIVIL PROCEEDING UNLESS LIBERTY IS IMPERILED.

Modern due process analysis for civil proceedings was discussed in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), where the Court considered the level of process due before disability rights can be terminated. The Court held that the level of process depended on balancing the private right at stake, the governmental interest (including the fiscal and administrative burdens of a specific procedural requirement), and the risk of erroneous decision-making. Eldridge, 424 U.S. at 334-35.

Eldridge involved neither the right to counsel nor children. However, a number of Supreme Court decisions do directly address the right to counsel under the Fourteenth Amendment, and other decisions

address the rights of juveniles. Together, these decisions significantly influence due process analysis for truants.

The seminal case addressing the Fourteenth Amendment right to counsel in civil proceedings is Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). Lassiter's parental rights were terminated after it was established that her child had not been provided adequate medical care, that she neglected the child, and that she was not in a position to care for the child because she faced a lengthy prison sentence. Lassiter, 452 U.S. at 20-23. Lassiter had a lawyer in her criminal case but she did not obtain counsel for the hearing on her parental rights. On appeal, she argued that trial counsel was mandatory pursuant to the Due Process Clause of the Fourteenth amendment. Id. at 24.

The Supreme Court held that due process does not always require appointment of counsel in hearings to terminate parental rights. In reaching this conclusion, the Court noted that deprivation of personal liberty is the touchstone for the requirement of counsel in both civil and criminal cases. Whereas liberty is almost always at stake in a criminal proceeding, it is not always jeopardized in a civil proceeding. Thus, any assertion of a right to counsel under the Due Process Clause of the Fourteenth Amendment in a civil proceeding must begin with the

presumption that counsel is not required. Lassiter, 452 U.S. at 25. The Court expressly said, "The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." Id.

Moreover, deprivation of physical liberty cannot be merely potential or hypothetical, it must be actual. Id. (citing Scott v. Illinois, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979) ("[T]he mere threat of imprisonment" is not enough to require counsel). Even in a criminal case, the Court noted, a defendant is not entitled to counsel unless she faces "actual imprisonment" or an actual "loss of personal liberty." Id. at 26. Thus, "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." Id. (citing Gagnon v. Spinelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) and Morrissey v. Brewer, 408 U.S. 471, 480, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (probationers have a lesser liberty interest, so no automatic right to counsel)). The Court summarized its holding as follows:

> ...the Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this

> presumption that all the other elements in the due process decision must be measured.

Id. at 26-27.

The Court then analyzed the Eldridge factors and "set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." Lassiter, at 27. The Court conceded that the Eldridge test appeared to favor the appointment of counsel because the parent's rights were significant, the government's interests were less so, and there was some risk of error. Id. at 29-31. Still, the Court concluded that the Eldridge factors did not overcome, in that case, the strong presumption that counsel was not *required* in a civil proceeding where a loss of liberty was not implicated. Id. at 31. That presumption would be overcome only if "the parents interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak..." Id. In other words, the presumption would be overcome only if the Eldridge balancing were wholly favorable to the litigant claiming a right to counsel.

Although the Court in Lassiter adopted a case-by-case analysis, courts have recognized the strength of the presumption against the appointment of counsel in civil cases. For example, in rejecting a right to

counsel in civil drug forfeiture cases, the Pennsylvania Supreme Court, described the presumption against counsel as a heavy burden "not easily overcome." Comm. v. $9,847.00, 550 Pa. 192, 704 A.2d 612 (1997).

This Court, too, has recognized that appointed counsel is not mandatory unless liberty is in jeopardy. In Tetro v. Tetro, 86 Wn.2d 252, 544 P.2d 17 (1975), this Court held that due process required counsel in a civil contempt proceeding, because the parent faced jail time.

> Whatever due process requires when other types of deprivation of liberty are potentially involved, when a judicial proceeding may result in the defendant being physically incarcerated, counsel is required regardless of whether the trial is otherwise 'criminal' in nature. The grim reality of a threatened jail sentence overshadows the technical distinctions between 'criminal,' 'quasi-criminal,' and 'civil' violations and demands that the protection of legal advice and advocacy be given all persons faced with it.

Tetro, 86 Wn.2d at 254-55. This Court emphasized that the threat to liberty must be immediate and real.

> The threat of imprisonment upon which we hold the right to counsel turns must be immediate. *The mere possibility that an order in a hearing may later serve as the predicate for a contempt adjudication is not enough to entitle an indigent party therein to free legal assistance.*

Tetro, at 255 n.1 (italics added).

More recently, in a decision considering whether different classes of litigant had a right to counsel on appeal, this Court held that "in civil cases, the constitutional right to legal representation is presumed to be

limited to those cases in which the litigant's physical liberty is threatened." In re Grove, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995) (citing Lassiter and Tetro).

In King v. King, 162 Wn.2d 378, 394-96, 174 P.3d 659 (2007), a case alleging that a private litigant in a dissolution proceeding had a right to appointed counsel, this Court held that there was no such right. In rejecting a due process argument, this Court held that "[t]he United States Supreme Court found that the federal Constitution does not require appointment of counsel in every parental termination proceeding" and that "[o]utside of cases involving a risk to a fundamental liberty interest, there is a presumption of a right to counsel only where physical liberty is at stake." King, 162 Wn.2d at 392, 392 n.13 (citing Lassiter and Grove, respectively).[2]

Decisions from the Washington Court of Appeals are consistent with the Lassiter approach. The case closest to the facts in this case is

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[2] In two decisions predating both Lassiter and Eldridge, this Court held that counsel was required for a parent facing permanent or temporary deprivation of parental rights. In re Luscier, 84 Wn.2d 135, 524 P.2d 906 (1974) (termination of rights); In re Myricks, 85 Wn.2d 252, 533 P.2d 841 (1975) (suspension of rights). The Court noted that "a parent's interest in the custody and control of minor children was a 'sacred' right" that could not be abridged without providing counsel. Luscier, 84 Wn.2d at 137. Neither case is particularly helpful to the analysis here because, first, a juvenile has no right -- much less a "fundamental" or "sacred" right -- to skip school, so a truant's right to skip school is not a right even remotely comparable to the right imperiled in the parental rights cases. Second, neither Luscier nor Myricks analyzed the Eldridge factors or the Lassiter presumption, so the cases provide no real guidance on application of the modern due process analysis.

In re Truancy of Perkins, 93 Wn. App. 590, 969 P.2d 1101, review denied, 138 Wn.2d 1003 (1999). In Perkins, the Court of Appeals held that the due process clause of the U.S. Constitution does not require legal counsel at preliminary juvenile truancy proceedings because the juvenile's interests were not nearly as compelling as the interests at stake in civil proceedings, where this Court had required counsel. Perkins, 93 Wn. App. at 595-96. See also Wulfsberg v. MacDonald, 42 Wn. App. 627, 713 P.2d 132 (1986), (husband had a right to appointed counsel in contempt proceedings for failure to pay child support because he faced jail time); In re Haugh, 58 Wn. App. 1, 790 P.2d 1266 (1990) (contempt for violating visitation orders; a litigant facing jail sanctions entitled to counsel).

There is simply no authority holding that a truant is entitled to counsel at public expense before she faces immediate deprivation of liberty . The Court of Appeals erred in failing to apply the Lassiter presumption to the Eldridge test, and in overturning the Perkins decision.

3. JUVENILES DO NOT HAVE GREATER DUE PROCESS RIGHTS THAN OTHER CIVIL LITIGANTS.

The main thrust of the Court of Appeals analysis appears to be the belief that juveniles are entitled to greater "protection" from the state, and that this protection must come in the form of appointed counsel. The Court of Appeals erred in this respect. In terms of due process analysis,

the Supreme Court has held that juveniles are entitled to less constitutional protection than are adults. Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984), is representative.

Martin involved a due process challenge to preventative detention rules in New York's juvenile courts. In balancing the competing interests, the court observed that

> [t]he state has a parens patriae interest in preserving and promoting the welfare of the child, . . . which makes a juvenile proceeding fundamentally different from an adult criminal trial. We have tried, therefore, to strike a balance -- to respect the "informality" and "flexibility" that characterize juvenile proceedings . . . and yet to ensure that such proceedings comport with the "fundamental fairness" demanded by the Due Process Clause.

Martin, 467 U.S. at 263 (citations omitted). In determining whether preventative detention was fair, the Court concluded that "in the context of the juvenile system, the combined interest in protecting both the community and the juvenile himself . . . is sufficient to justify such detention." Id. at 264. As to restrictions on the juvenile's liberty, the Court said:

> The juvenile's ... interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial. . . . But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. . . . Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the

> State must play its part as parens patriae. . . . In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's `parens patriae interest in preserving and promoting the welfare of the child.'

Martin, 467 U.S. at 265 (citations omitted). The State has an interest in "protecting the juvenile from his own folly" and in preventing "the downward spiral of criminal activity into which peer pressure may lead the child." Id. at 266. Thus, the same preventative detention can be constitutional for juveniles but not for adults.

The Supreme Court has found lesser due process rights for juveniles in other arenas, too. For instance, juveniles do not have a right to counsel in school disciplinary proceedings. Goss v. Lopez, 419 U.S. 565, 583, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). Likewise, juveniles have no right to counsel in a voluntary civil commitment instituted by a parent. Parham v. J.R., 442 U.S. 584, 604-09, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979). And, juveniles have no right to a jury trial in criminal proceedings. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Collectively, these cases establish that the Due Process Clause applies to juveniles in criminal and civil proceedings, but the cases also recognize that juveniles have fewer rights than adults, due to their status and their relative immaturity. The Court of Appeals inverted this

principle, however, and held that juveniles had a right to counsel when an adult might not have such a right, i.e., absent deprivation of liberty, simply *because* they were juveniles. This was error.[3]

4. DUE PROCESS DOES NOT REQUIRE COUNSEL FOR E.S.

If the test under the Lassiter / Eldridge set forth above is correctly applied, it is clear that E.S. was not entitled to appointed counsel in her first truancy proceeding -- the only hearing at which she had no lawyer.

As to the first Eldridge factor, E.S. has a relatively weak interest. Her primary interest is, apparently, the desire not to be compelled to attend school. This interest pales in comparison to a parent's interest in maintaining the right to raise his or her child, and it certainly is not sufficient to overcome the Lassiter presumption.

Under the heading of "liberty interest," the Court of Appeals also discussed at length the inability of children to defend themselves in court. E.S., 148 Wn. App. at 213-15. The court did not, however, explain how this discussion pertained to E.S.'s "liberty" or how that liberty was

[3] The Court of Appeals also erred when it said that Washington provides counsel to children in every other juvenile proceeding. See Motion to Reconsider at 29-30. See also: RCW 13.32A.160 - .170 (in CHINS proceedings, counsel required when child to be removed from home but otherwise discretionary); RCW 13.34.100 (1), (6) (counsel discretionary in dependency proceedings; a GAL *shall* be appointed in dependency *unless* court finds appointment unnecessary; court *may* appoint counsel for child over 12 if requested); RCW 13.32A.192(1)(c), (3) (court *shall* appoint counsel in At-Risk Youth proceeding; but risk of immediate deprivation of liberty exists since child may be apprehended before a hearing).

immediately imperiled prior to the contempt stage. Regardless of a juvenile's relative skill in defending himself, the relevant question is whether a lawyer must be appointed at public expense to assist the child when his liberty is not threatened. As explained above, there is no such authority, and the Supreme Court has also suggested that States have significant latitude within the requirements of the Due Process Clause to control juveniles, especially when the juvenile is engaging in self-destructive behavior. Schall v. Martin, supra. Thus, the Court of Appeals' "liberty" analysis was flawed. A correct analysis would not mandate counsel at an initial truancy proceeding.

The Court of Appeals also discussed at some length the student's privacy interests because drug testing can occur. E.S., 148 Wn. App. at 216. This discussion is inapposite in a case, like this one, where the student was never required to submit to alcohol or drug testing. Even if relevant, however, the analysis is flawed because the Court of Appeals failed to appreciate the very limited nature of the privacy rights of students vis-a-vis the interests of parents and schools to monitor drug use. Under the U.S. Constitution, the child's ability to thwart a search, even a random search, by school officials is very limited. Safford Unified School Dist. No. 1 v. Redding, ___ U.S. ___, 129 S. Ct. 2633, 174 L. Ed. 2d 354 (2009); New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d

720 (1985). Thus, when considering whether the federal constitution requires a lawyer to defend against such searches, federal law would seem to control.

Even the more protective privacy rights found in article 1, section 7 of the Washington Constitution do not establish that the Due Process Clause requires counsel in a truancy action simply because a drug testing order might be entered. Contrary to the appellate court's suggestion in E.S., 148 Wn. App. at 216 n.45, York v. Wahkiakum School District, 163 Wn.2d 297, 178 P.3d 995 (2008), does not mandate counsel where drug testing might be ordered. The narrow holding in York is that school districts may not randomly drug-test student athletes. However, a majority of justices clearly recognized that students have diminished privacy expectations, and school officials may search based on reasonable suspicion of drug use or other wrongdoing. See York, 163 Wn.2d at 318 (Madsen, J. concurring, citing State v. McKinnon, 88 Wn.2d 75, 558 P.2d 781 (1977) (school officials may search based on reasonable suspicion)) and Kuehn v. Renton School District No. 403, 103 Wn.2d 594, 694 P.2d 1078 (1985) (random luggage search disallowed but searches based on reasonable suspicion are constitutional). See also York, at 329-40 (discussing rights of children and duties of school officials under the state constitution and statutes). A school official may search a student without

a warrant, and without providing counsel for the student, if the search is based on reasonable suspicion.

It would seem incongruous to conclude that the constitution requires appointment of a lawyer when a *court* orders drug testing of a truant student -- at the behest of a school official during truancy proceedings -- whereas a school official can -- outside of truancy court -- search a student without providing counsel. Thus, the "privacy" factor identified by the Court of Appeals should not weigh heavily in the due process analysis, especially when balanced against the presumption that counsel is not required in civil proceedings, and in light of the lesser privacy rights of juveniles in the school system.

The Court of Appeals also held that a lawyer was required because the "educational interests" of the child were imperiled because the superior court had the authority to order E.S. to change schools or enroll in an alternative education program.. E.S., 148 Wn. App. at 216. This holding misperceives the "educational interest" as well as the utility or necessity of appointing counsel to vindicate the interest. Schools can administratively suspend, expel and transfer students from their previously assigned school, and such decisions are subject to only minimal due process. See e.g. Goss v. Lopez, supra. Appellate litigation usually concerns whether any administrative hearing is required, not over whether a student has a right

to counsel before expulsion, transfer, or reassignment. See Right of Student to Hearing on Charges Before Suspension or Expulsion From Educational Institution, 58 A.L.R.2d 903 (originally published in 1958).

If schools generally have the right to expel, suspend, or transfer students without providing a lawyer, it is difficult to see why a court, acting at the behest of a school administrator in a truancy action, should have to appoint an attorney before deciding that a child would be better served by a different school. E.S. fails to establish that she had any constitutionally protected interest in attending a *particular* school -- the one she refused to attend -- such that deprivation of that "interest" requires counsel..

As to the second Eldridge factor – the governmental interest – the District's interest here is comparatively strong. That interest is to ensure that children who fail to attend school are offered special attention from school counselors and administrators and, if necessary, the superior court, in an effort to persuade or coerce the student to regularly attend school. The "governmental" interest is actually the interest of the people of the State of Washington whose representatives have enacted an entire truancy code to help coax a larger percentage of students to remain in school.

Finally, as to the risk of error, a determination that a child is truant is not especially difficult or complex as compared to other similar proceedings.

Thus, "set[ting] the.. net weight in the [Eldridge] scales against the presumption that there is a right to appointed counsel only where the indigent . . . may lose his personal freedom" illustrates that E.S. has failed to show a due process violation. Lassiter, 452 U.S. at 27. She has failed to show that her "... interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak..." Id.

5. FOREIGN STATES DO NOT GENERALLY REQUIRE COUNSEL EARLIER OR MORE OFTEN THAN DOES WASHINGTON.

E.S. has not cited a single case holding that counsel is required by the Due Process Clause in a truancy proceeding where the juvenile's liberty was not immediately threatened. Instead, E.S. suggests that since the rule is *statutorily* required in eight states, it should be constitutionally required in Washington. Answer to Petition for Review at 17-19.[4] Since none of these statutory schemes is constitutionally compelled, the citations

[4] E.S. discusses statutes in Alabama, Arizona, Massachusetts, Minnesota, Nevada, New Hampshire, Oregon, Wisconsin.

are of marginal relevance. Moreover, in some of the statutes, counsel is permissive not mandatory.[5]

Finally, the diversity of legislative responses to truancy is illustrated in these various state schemes, and makes comparison to Washington very difficult. Approaches are grounded in criminal law, civil law, family court, juvenile court, state-wide initiatives, and local school district autonomy. In many of the cited states, truancy falls under educational neglect provisions of state dependency statutes. When a court finds a child "incorrigible" (Arizona) or "in need of services or protection" (Alabama, Massachusetts, Minnesota, Nevada, New Hampshire, Oregon, Wisconsin), that child is subject to *immediate* disposition, including removal from the home, placement under protective supervision, and the like.[6] Thus, a disposition affecting liberty may be ordered under these other laws at the initial hearing. At the initial truancy hearing in Washington, by contrast, a child *might* become subject to a *future* contempt order and deprivation of liberty, but only if the child fails to comply with the court's orders, and is found in contempt. In short, there is

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[5] Ala. Code Sec. 12-15-202(f)(1)(a); Minn. Stat. §260C.163 (3)(c) (2008); Wis. Stat. §938.23(1m)(b)(1)-(2) (2005); In re Hilary, 450 Mass. 491, 496-97 n.13, 880 N.E.2d 343 (2008) (noting limits of right to counsel under Mass. Gen. Laws, Ch. 19, §§ 23 - 26).

[6] See generally Alabama – Ala. Code Sec. §12-15-71 (2009); Arizona – ARS §8-341 (2); Massachusetts – G.L.M. §119, §39G (no independent truancy provisions); Minnesota - Minn. Stat. §260C.163 (3) (2008); New Hampshire - RSA §169-D:14; Nevada - Nev. Rev. Stat. Ann. § 62E (2008); Wisconsin – Wis. Stat. §938.23(1m)(b)(1)-(2) (2005).

no consensus among the states on the scope or timing of a right to counsel for truants, except perhaps the rule that counsel is required before a child's physical liberty is taken.

6. WHETHER CHILDREN WHO CHRONICALLY FAIL TO ATTEND SCHOOL NEED GUARDIANS, LAWYER ADVOCATES, OR SOME OTHER ASSISTANCE, IS A LEGISLATIVE QUESTION.

E.S. argues that the "District does not understand the value of counsel" and argues that lawyers can be very helpful in protecting the interests of the child. Answer to Petition for Review at 15-16. The District agrees that, in some cases, a lawyer could assist a child or the court in developing a sound plan to end the child's truancy. But E.S. fails to recognize two important points.

First, the issue is not whether counsel might be an improvement in some cases; rather, the issue is whether counsel is required in *every single* truancy proceeding. As the Supreme Court has held, "[a] ... procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." Snyder v. Massachusetts, 291 U.S. at 105. While counsel might be of assistance in some cases, counsel might be an impediment in others. Whether, on balance, lawyers help or hurt is an open question. E.S. had a court-appointed lawyer for well over a year,

yet she continually refused to attend school. The legislature is clearly entitled to weigh competing models and decide whether lawyers will truly improve truancy proceedings.

Secondly, E.S. fails to distinguish between, on the one hand, the role of a lawyer advocate in an adversary proceeding and, on the other hand, the role of an advisor to the court regarding the child's best interests, like the role of a guardian ad litem (GAL).[7] This is a critical distinction in litigation involving children, especially in truancy matters which are not usually thought of as adversarial proceedings. The traditional attorney-advocate is ill-suited to this role.[8]

Yet, E.S. argues for the value of counsel *assuming* that counsel will assume the roles of confidant, counselor, and GAL, and that the lawyer will advocate for the best interests of the child. This assumption is unwarranted. The rules of professional conduct provide that "a lawyer

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[7] See RCW 13.34.105 (defining the role of a GAL).

[8] Admin. for Children & Families, U.S. Dep't of Health & Human Servs., Adoption 2002: The President's Initiative on Adoption and Foster Care, Guidelines for Public Policy and State Legislation Governing Permanence for Children, Guideline VII(14) cmt. (2001), available at http:// www.acf.dhhs.gov/programs/cb/publications/adopt02/ ("There is considerable ongoing discussion among lawyers, judges, and other children's advocates about the appropriate role for a lawyer to assume when representing child clients. In particular, a range of views exists about the extent to which lawyers should take direction from their child clients. For the most part, States have provided inadequate guidance to lawyers for children about their proper role and, as a result, each lawyer makes her or his own decision. This ad hoc approach produces confusion among clients, other involved individuals, and the courts. It also has the effect, overall, of reducing the quality of legal representation.")

shall abide by a client's decisions concerning the objectives of representation." RPC 1.2(a). If E.S. is correct that she has a constitutional right to a lawyer, then the lawyer representing her in a truancy matter would seem to be obliged to represent her stated interest of avoiding compulsory schooling, if that were her desire. This hardly seems compatible with either constitutional or statutory goals, and it certainly would not seem to be in the child's best interests. In any event, this is precisely the sort of difficult balancing and decision-making that should be left to the legislative process.

D. CONCLUSION

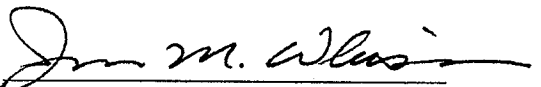
A litigant in a civil proceeding is presumed not to be entitled to counsel as a matter of right unless her liberty is at stake. E.S. has failed to show an immediate threat to liberty. Moreover, she has not shown that her privacy or educational interests grossly outweigh the State's interest in having her attend school. Finally, she has not shown an unusual chance of error in truancy proceedings. Thus, the Court of Appeals erred in holding

that she was entitled to counsel at the preliminary hearing. The court's decision should be reversed, and the order of the superior court denying E.S.'s motion for counsel should be affirmed.

DATED this 28th day of October, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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Certificate of Service by Mail

~~Today I sent~~ by electronic mail directed to the following counsel for E.S. and amici, a copy of the Supplemental Brief of Petitioner (Revised), in Bellevue School District v. E.S., Cause No. 83024-0-I, in the Supreme Court of the State of Washington.

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

James M. Whisman — 10/28/09

Name James M. Whisman
Done in Seattle, Washington

Date 10/28/09

ORIGINAL